No. 9058.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

RESEARCH PRODUCTS CO., LTD., a corporation, CALIFORNIA PRODUCTION CO., a corporation, HENRY BRANHAM, ARTHUR J. DIETRICK and ABRAHAM M. HERBSMAN,

Defendants and Appellants,

vs.

THE TRETOLITE COMPANY, a corporation, and TRETOLITE COMPANY OF CALIFORNIA, LTD., a corporation,

Plaintiffs and Appellees.

SUPPLEMENTAL BRIEF FOR APPELLEES.

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SUPPLEMENTAL BRIEF FOR APPELLEES.

This supplemental brief is being filed pursuant to the direction given by the Court at the oral argument of the cause. As noted in our original brief (p. 4), Dr. Beckman of the California Institute of Technology was appointed to sit with the District Judge at the oral argument on exceptions to the Master's report. This Court has suggested the possibility that as a result this Court is without power to review the findings below, and has requested the parties to present their views and such authorities as they may have relative thereto. Before discussing the authorities, or the lack of the same, we deem

it important to note exactly at what point in the progress of this case Dr. Beckman was appointed and the scope of his employment.

This cause was referred for trial to a Special Master by stipulation of the parties. The stipulation and order provided that the Special Master was to take and hear the evidence offered by the respective parties and to make his findings of fact and conclusions of law thereon and recommend the decree to be entered herein, the report of the Special Master to be subject to full review as to all findings of fact and conclusions of law by the Court, on exceptions duly filed [I. 127]. As provided in Rule 53 (5) of the New Rules of Civil Procedure, the effect of the Master's report is the same whether or not the parties have consented to the reference. The Special Master heard the evidence and filed his report, setting forth in detail his findings of fact and conclusions of law with respect to each of the issues tried before him, and recommended the entry of a decree for plaintiffs upon the patent here in issue [I. 128-154]. The defendants filed exceptions to the Master's report [I. 155-170]. In considering these exceptions the Court below (Rule 53 (e) (2)) and this Court (Rule 52 (a)) should accept the Master's findings of fact unless found to be "clearly erroneous".

At the oral argument on the exceptions to the Master's report, the District Judge, having noted the complicated chemical subject involved, of his own volition suggested that he would be more apt to reach an intelligent and just and correct result in this case if he had the assistance of a disinterested, qualified expert [III. 1210]. In response to this suggestion counsel for the defendants urged that the Court appoint an expert who should go to the extent of repeating the analytical work that had been testified to

before the Master and determine those issues for the Court [III. 1211-1213]. Plaintiffs' counsel, however, objected, reminding the Court that the present status of our judicial procedure in this country contemplates that the decision must be that of the District Judge and not the decision of some assistant who might be appointed [III. 1214]. The District Judge thereupon stated,

> "I guess the fault lies in the expression of language that I used. It was furthest from my mind to pass on to some chemist, or, for that matter, anybody else, the burden or responsibility of deciding the case." [III. 1219.]

With that assurance, plaintiffs' counsel agreed that the Court might select a technical advisor "to assist the Court in understanding what the subject is about". [III. 1221.] Thereupon the District Judge appointed Dr. Beckman

> "to sit with me to hear this argument and, of course, to take such part in the discussion as will, in his judgment, help to elucidate and clarify the respective contentions, and following the argument, to advise with me as to the technical phases of the case; that is to say, as to the interpretation of the various chemistry terms." [III. 1225.]

It is clear from the record that Dr. Beckman was appointed solely as an advisor to aid the Court in interpreting the scientific terms appearing in the record taken before the Special Master. The same information could have been procured by the Court at a much greater sacrifice of time from standard technical works on chemistry. Dr. Beckman was not by reason of his appointment to participate in or have any part in the making of the Court's decision. There is nothing in the record or within our knowledge to suggest that Dr. Beckman did more than aid

the Court in interpreting the chemical terms involved. The District Judge filed his own memorandum of conclusions [I. 171-177] and adopted the Master's findings, supplemented by those of his own [I. 178-185].

We find no ruling of any federal court bearing on the instant situation. It seems clear that in the absence of a stipulation of the parties the District Judge would have no power to appoint a technical advisor or expert in a patent case (see Judge Clark's discussion of this matter in *Tolfree v. Wetzler,* 22 F. (2d) 214, 221). But if agreeable to the parties we see no reason why a District Judge could not do so upon stipulation. If a court will accept the stipulation of the parties as to a fact, it seems to follow that the court could accept the stipulation of the parties that he should have a technical advisor to assist in interpreting any technical evidence that the parties may offer of a fact. Such a practice seems to be approved in the State of New York. *Nichols v. Corroon,* 274 N. Y. S. 596, 242 App. Div. 787. In that case the appointment by stipulation, following judgment, of a medical expert to aid the Court in determining the extent of injuries was approved.

It is well settled that a court has a right to take judicial notice of scientific facts and calculations, and as a necessary corollary may resort to and obtain information from any source of knowledge he feels would be helpful to him, even inquiring of others if he deems them reliable. 23 *Corpus Juris* 169. In discussing this matter, the author in *Jones on Evidence,* Horwitz Edition, Vol. 1, §132 (134), says:

> "It frequently happens that it is necessary or proper for the court to refer to sources of information concerning matters which have not been referred to in

the evidence, in which case it is his duty to resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most appropriate; sometimes too concerning matters of law, and in either case he may use all proper means for satisfying himself in any way that appears to him satisfactory. Sometimes he personally knows more than the court should know; but when he feels that he knows less, then he is the proper conduit through which judicial knowledge, acquired by him for the purpose, shall be conveyed, in order that the court may be given understanding of it. In a New York case the opinion shows that the court had referred to various documents and to Pollard's and Greeley's histories of the Civil War. In the celebrated Dred Scott case, Chief Justice Taney evidently had resorted not only to judicial decisions, statutes, ordinances and works of history, but to whatever sources were available to throw light upon the social and political condition of the African race in the early history of the country. Dr. Wharton illustrates the principle: 'The judge may consult works on collateral sciences or arts, touching the topic on trial. He may draw, for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing. He may refer to almanacs; he may appeal to his own memory for the meaning of a word in the vernacular; he may, as to the meaning of terms, refer to dictionaries of science of all classes; he may determine the meaning of the abbreviations of Christian names and offices, and of other common terms; as to a point of political history (e. g., the recognition of a foreign government); he may consult the executive department of the state; he may cause inquiry to be made as to the practice of other courts; and Lord Hardwicke went

> so far as to inquire of an eminent conveyancer as to a rule of conveyancing practice. And so the court may have recourse to the legislative rolls to determine the construction of a statute.' "

The rule in California seems to be that stated in *People v. Mayes,* 113 Cal. 618, as follows:

> "The judicial notice which courts take of matters of fact embraces those facts which are within the common knowledge of all, or are of such general notoriety as to need no evidence in their support, and also those matters which do not depend upon the weight of conflicting evidence, but are in their nature fixed and uniform, and may be determined by mere inspection, as of a public document, or by demonstration, as in the calculations of an exact science. These matters may not be within the personal knowledge of the judge who presides over the court, but, if a knowledge of them is necessary for a proper determination of the issues in the case, he is authorized to avail himself of any source of information which he may deem authentic, either by inquiring of others, or by the examination of books, or by receiving the testimony of witnesses. (Rogers v. Cady, 104 Cal. 290; 43 Am. St. Rep. 100.)"

The power to inquire of others is apparently not limited to the appointment of a court expert under §1871 C. C. P.

Under these circumstances we hesitate to urge that the appointment of Dr. Beckman to aid the Court in interpreting the various terms of chemistry involved in this case does more than add to the weight to be given to the findings below. We believe the rule followed by this Court in *Guiles v. United States,* 100 F. (2d) 47, and the cases there cited, can be distinguished. In those cases

the responsibility for the making of the decision was transferred from the tribunal designated by law to a tribunal not authorized by law. In this case the Court below expressly retained the full burden and responsibility of deciding the case. The situation is more like that presented where a case is erroneously heard by a special three-judge court in lieu of a single federal district judge. It has been held that the presence of the two additional judges at the hearing does not affect the decision (*Healy v. Ratta,* 67 F. (2d) 554 (C. C. A. 1)), provided the decision is in accord with the view of the single district judge who should have heard the case alone. *Cannonball Transportation Co. v. American Stages, Inc.,* 53 F. (2d) 1050 (D. C. Ohio). See *Oklahoma Gas & E. Co. v. Oklahoma Packing Co.,* 292 U. S. 386, 78 L. ed. 1318.

We do not believe that the result on this appeal would be changed irrespective of how the instant question be determined. On the one hand this Court would refuse to review the findings below; on the other it would determine whether there is any finding which appellants assert is not supported by substantial evidence. There is no such finding. Therefore, in either event, the findings will not be disturbed. There is no claim that there is any irregularity in the pleadings, process or decree. Accordingly, the decree below should be affirmed.

Respectfully submitted,

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